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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1288

ALICE ELIZABETH NUNNALLY,
Petitioner,

vs.

THE STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

ALICE ELIZABETH NUNNALLY,
Petitioner,

vs.

THE STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

This is a petition to the Supreme Court of the United States for a writ of certiorari to the Supreme Court of the State of Georgia to submit for review and reversal here the opinion and decision of the Supreme Court of the State of Georgia which denied the motion for rehearing on December 15, 1975. The original decision was decided and entered November 24, 1975, in its Case Number 30250, entitled ALICE ELIZABETH NUNNALLY vs. THE STATE OF GEORGIA.

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OPINION

The opinion of the Georgia Supreme Court is officially recorded in 235 Georgia Supreme Court Reports, Page 693 (1975). This case was originally appealed from the Cobb County Superior Court to the Supreme Court of Georgia. The opinion in this case dated November 24, 1975, notice of denial of rehearing dated December 15, 1975, and the order granting stay of remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States dated December 30, 1975, appear here as an appendix, in accordance with Rule 39.

The decision of the Supreme Court of the State of Georgia hereby appealed from was rendered December 15, 1975, denying appellant-petitioner's motion for rehearing of opinion entered November 24, 1975. The order granting stay of remittitur in the Georgia Supreme Court was rendered December 30, 1975.

JURISDICTION

Jurisdiction of this court to review this cause is believed to exist in United States Code Title 28, Section 1257.

QUESTIONS PRESENTED

1.

(a) Were the defendant's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States violated by a judge's charge to the jury as follows:

> "If you find a homicide is proved to have been committed in this case by this defendant with an instrument which if you find was, in the manner in which it was used upon the occasion in question, a weapon likely to produce death, the law from the use of such weapon in that manner presumes malice and the intent to kill."

(b) Was such a mandatory presumption as set forth in the charge above constitutionally impermissible under the Fifth and Fourteenth Amendments particularly in a jurisdiction where such presumption was not legislatively created, and in a case where the defense was accident.

(c) Did not the constitutionally impermissible taint under the Fifth and Fourteenth Amendments still exist and remain where the court further charged the jury and emphasized the duty to find guilt as follows:

> "It is not incumbent upon the accused to prove an absence of malice if the evidence for the prosecution shows facts which may excuse or justify the homicide. If the homicide was in your opinion unlawful, and if there was present the intent to kill and malice, the offense would be murder, and it would be your duty to find the defendant guilty of the crime of murder."

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2.

(a) In a case where the defense was accident were the defendant's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States violated by a judge's charge to the jury as follows:

> "That the acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted.
>
> That a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted."

(b) If the charge, a rebuttable presumption, was constitutionally permissible, did the charge violate the Fifth and Fourteenth Amendments of the Constitution of the United States when coupled with the charge set forth in the question presented Number 1.

3.

(a) Did a 2:00 A. M. Saturday interrogation of the defendant violate her rights under the Fifth and Fourteenth Amendments to the Constitution of the United States where defendant had already been in custody since early Friday morning, gave a statement Friday morning, and employed counsel Friday P. M., where the interrogating police officers had actual knowledge of the name and employment of counsel, where it was anticipated and it was normal procedure for Mrs. Nunnally to be moved from Smyrna Jail on Friday P. M., when she was held in Smyrna until after the 2:00 A. M. interrogation and where the defendant had been informed by the police that the police were investigating the lesser charge of voluntary manslaughter.

(b) If such questioning procedure under the circumstances as are set forth in 3 (a) is constitutionally impermissible, did such procedure also make inadmissable previously given statements by Mrs. Nunnally to the police.

CONSTITUTIONAL PROVISIONS INVOLVED

1.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ARTICLE V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ARTICLE XIV

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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STATEMENT OF THE CASE

Alice Elizabeth Nunnally was arrested on a warrant for murder and concealing death on July 12, 1974. The Grand Jury filed in the Clerk's Office its bill of indictment on August 20, 1974, and a trial was held beginning November 4, 1974, with a jury verdict rendered on November 7, 1974. A motion for new trial was timely filed and amended with the Cobb County Superior Court overruling the motion on June 2, 1975. The case was then appealed to the State Supreme Court on behalf of Alice Elizabeth Nunnally with the State Supreme Court giving its opinion on November 24, 1975, and overruling the motion for rehearing on December 15, 1975.

Alice Elizabeth Nunnally, the defendant accused, was a church hostess at the First Baptist Church of Smyrna, Georgia, and had known the deceased for about ten years. On the morning of July 11, 1974, Alice Elizabeth Nunnally picked up Lee Calhoun at Mr. Calhoun's request from the Belmont Hills Shopping Center in Smyrna, Cobb County, Georgia, and returned to the Nunnally home with Mr. Calhoun. A pistol had previously been purchased which Mrs. Nunnally stated was to be given to Phillip Sullivan, a teacher in her department who was anticipating moving from the State, and Mr. Calhoun inquired about checking the pistol out in a bank in the back yard of the Nunnally residence. The best route to the back yard is through the kitchen, down the basement stairs and out the basement door. Mrs. Nunnally carried the pistol which had previously been loaded under the direction of Mr. Calhoun and Mr. Calhoun went first down the steps into the basement, while Mrs. Nunnally was putting in her den a church requisition that had been signed by Mr. Calhoun at the kitchen table. Mr. Calhoun was chairman of the Hostess

Committee and routinely signed requisitions for the church hostess. Upon Mrs. Nunnally's return to the kitchen, she picked up the gun which she had laid on the table while putting up the requisition, and started down the stairs to the basement where Mr. Calhoun was already waiting at the foot of the steps. It had been stipulated that Mr. Calhoun had .07 percent of ethyl alcohol in his blood, the same being equivalent to three cans of beer, nine ounces of wine, or three ounces of 100 proof alcohol. Mrs. Nunnally does not drink. As Mrs. Nunnally reached approximately the second or third step from the bottom, Mr. Calhoun reached back with his left hand and took hold of Mrs. Nunnally's right hand, the hand in which she had the gun, which startled Mrs. Nunnally. She was not expecting him to do this and when he did, she pulled back and the gun went off. Scratches were on the back of Alice Elizabeth Nunnally's hand at the Smyrna jail. She stated that she had slipped on the step and was not sure if she slipped just before the gun went off or after the gun went off but she did slip on the steps. The silhouette of Mr. Calhoun was outlined between the posts in the basement. There was also a steel post in the basement at the foot of the stairs. When the gun went off, she reached for Mr. Calhoun and blood came out all over her back, her hair and her neck. As he fell, she caught him and under his weight, managed to lay him down at the bottom of the kitchen steps. The gun was fired only one time, with the bullet severing the ascending aorta. Such severance is always fatal and death ensues within a matter of minutes. A person can stay on his feet after an injury of this sort for anywhere from a few seconds to two minutes. Blood appeared to be everywhere and Alice Elizabeth Nunnally blacked out. She could not remember what happened once she got Lee Calhoun to the floor. She knows that she thought about calling an ambulance but she was in shock and the next

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thing she could remember was that the telephone was ringing and she went upstairs to answer it. When she answered the telephone, it was her brother-in-law who told her that her sister in Rome, Georgia, had been injured. After that, she did not remember what happened, but does remember sitting down on the floor and seeing the blood all over her. She did have concern that Lee Calhoun did not like blood and all she could think about at this point was cleaning the blood off of Mr. Calhoun. At this time, Lee Calhoun was dead. Alice Elizabeth Nunnally returned to the basement, cleaned up Mr. Calhoun as well as the basement, and wrapped Mr. Calhoun's body in plastic and moved him into an area of the basement and placed boxes over his body. Alice Elizabeth Nunnally was unable to explain why she moved Mr. Calhoun's body or why she placed the body under boxes in her basement. Mrs. Nunnally's sister visited her that afternoon and her husband and son came home from work that evening, without Mrs. Nunnally remembering that there was a body in the basement or informing these family members of that fact. Her son, Pat, went to the basement and took a nap after he came home from work that afternoon and Mrs. Nunnally and her husband went out to supper leaving their son Pat in the house unattended. When they returned from supper, their son left for a ballgame and Garnett Nunnally left for a board of directors' meeting of the Lions Club, leaving Mrs. Nunnally in the home by herself. She felt sick and stayed in bed and had no recollection of the incident that occurred that morning. Once she did have recollection of the occurrence, which was later that night after she and her husband had retired, she immediately advised her husband and after some considerable conversation with both her husband and son, the husband had the son call the police. In each instance in talking to the police, Alice Nunnally contended that the shooting of Lee Calhoun was an acci-

dent. A psychiatrist by the name of Sheldon Cohen testified that Alice Nunnally was a conventionalized normal person and had no strong anger directed toward anyone. He further testified that he found Alice Nunnally was puzzled about what had gone on and could not understand why people did not believe her and did not accept what she said was true about what took place. The psychiatrist explained the hiding of the body as the act of a woman in psychological shock who behaved in an automatic way. She had what was referred to as a splitting of her mind and her conscience. She knew something should be done but apparently Lee Calhoun died quickly and the only thing that she was conscious about doing was to go about a semblance of normalcy, which to her would have been cleaning up and tidying up the situation.

The court in charging the jury, gave the jury the following direction:

> "If you find a homicide is proved to have been committed in this case by this defendant with an instrument which, if you find was, in the manner in which it was used upon the occasion in question, a weapon likely to produce death, the law from the use of such weapon in that manner presumes malice and the intent to kill.
>
> It is not incumbent upon the accused to prove an absence of malice if the evidence for the prosecution shows facts which may excuse or justify the homicide. If the homicide was in your opinion unlawful and if there was present the intent to kill and malice, the offense would be murder, and it would be your duty to find the defendant guilty of the crime of murder."

The question as to the propriety of this charge and the burden it placed upon the defendant in this case was

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brought to the trial court's attention and was raised in the amendment to the original motion for new trial in the Cobb Superior Court in Grounds 4, 5 and 6 of said amended motion for new trial, where in 4(f) it was stated:

> "Said charge was violative of the Fifth and Fourteenth Amendments of the Constitution of the United States in that it violated due process of law by placing the burden of disproving guilt and removing the presumption of innocence from the defendant."

The court further in charging the jury gave the jury the following additional directions:

> "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted."

> "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted."

The question as to the propriety of these charges was brought to the trial court's attention in the amended motion for new trial. The trial court overruled the amended motion for new trial.

The above issues were further argued before the Supreme Court of the State of Georgia and were specifically set forth in both the enumerations of error and the brief in that court as well as in the motion for rehearing. The Supreme Court of the State of Georgia affirmed the trial court.

During the trial of the case the interrogating police officers admitted that after having told Alice Elizabeth Nunnally that the contemplated charge was voluntary manslaughter and after learning of Mrs. Nunnally's employ-

ment of counsel on Friday, P. M., they proceeded to question her at 2:00 A. M. on Saturday morning. It was customary to send prisoners to Marietta and it was expected that Mrs. Nunnally would be transported on Friday evening.

The testimony of the officers as to what Mrs. Nunnally told them at this interrogation was objected to. The trial judge, after objection, admitted testimony in evidence that Mrs. Nunnally told the police officers she loved Lee Calhoun. Also, there was some difference as to precisely how the gun happened to go off.

The admission of this testimony was set forth in the motion for new trial as error and also enumerated as error to the Supreme Court of the State of Georgia. Both courts sustained the previous ruling of the trial court.

We submit that this court can and should consider the questions presented on the constitutional issues raised.

ARGUMENT FOR THE ALLOWANCE OF WRIT

Question 1

It is contended that the Georgia Supreme Court has not decided the questions herein presented in accord with applicable decisions of this court and said decision complained of is contrary to constitutional principles of due process. The questions presented are of substance.

It is apparent that the Supreme Court of the United States has dealt with the question of presumptions and the troublesome task of determining what presumptions, if any, are constitutionally permissible in cases such as *Tot* v. *U. S.*, 319 U. S. 463 (1943), *U. S.* v. *Romano*, 382 U. S. 136 (1965), *Leary* v. *U. S.*, 395 U. S. 6 (1969), *Turner* v.

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U. S., 396 U. S. 398 (1970) and *In Re Winship* v. *U. S.*, 397 U. S. 359. Additionally, the court is familiar with the implications concerning presumptions contained in the case of *Mullaney* v. *Wilbur, Jr.*, ... U. S. ....., 95 Sup. Ct. 1881, 43 L. W. 4695.

In the case here, the trial court charged the jury on certain presumptions, one of which was: where death has occurred by a weapon likely to produce death, the law presumes malice and the intent to kill.

This charge was created by the trial judge. It was sustained by the Supreme Court of the State of Georgia. This presumption has no legislative basis. Appellant contends that such charge was mandatory in nature for the judge made it clear that *the law* (emphasis added) presumes malice and the intent to kill.

It is further submitted that where the presumption is judge-made rather than legislatively determined as is the case here, particularly where the import and force of the charge to the jury is mandatory in character and gives the jury no standard by which they can accept or reject the presumption, then due process of law is violated.

The presumption concerning the use of a deadly weapon in this case has as its effect the direction of a verdict for the State. Such result is neither permitted nor authorized by the Fifth and Fourteenth Amendments to the Constitution of the United States and where the possibility of such result exists, then the constitutional standard by which all citizens must be tried when accused of a crime is violated.

Question 2

Two of the presumptions complained of herein, that the acts of a person of sound mind and discretion are pre-

sumed to be the product of the person's will and that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, are legislatively created. These two presumptions, though stated to be rebuttable, have no stated standard by which the jury is to determine whether or not they have been overcome. The jury has little direction as to what quantum of evidence is required to overcome either of the two above presumptions. Coupled with the presumption in Question 1, the presumption has become constitutionally impermissible in a case of accident.

Summary As to Questions 1 and 2

It is submitted to the court that under the Fifth and Fourteenth Amendments to the Constitution of the United States and under the previous cases of this court, each and every element of a crime must be proven by the State beyond a reasonable doubt. The presumption of innocence cannot be overcome by either the possibility or the probability that the accused committed a crime. A "more likely than not" test by which some presumptions have been measured in the older previous cases does not adequately protect the constitutional due process requirement to presume innocence.

It is respectfully requested that this court grant certiorari in order to review the case, determine the constitutional standard which proof of each element of a crime must meet and declare that constitutional protections of citizens prevent convictions where presumptions avoid and make unnecessary proof of essential elements of a crime. The court should also hold unconstitutional all mandatory presumptions and all presumptions which do not have expressed to the jury the basis on which they may be overcome.

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Question 3

The 2:00 A. M. interrogation of Alice Elizabeth Nunnally by police officers, informed that defendant had counsel, was in this case, constitutionally impermissible. The officers by normal procedure and anticipation were to move Alice Elizabeth Nunnally from Smyrna to Marietta on Friday (T-156). Mrs. Nunnally had been informed that the anticipated charge against her was voluntary manslaughter (T-157). The officers' diligence in procuring an additional discussion with Mrs. Nunnally without counsel by scheduling such conference at 2:00 A. M. in the morning where they, by all human experience, knew that counsel would not be present violated due process. The very officers who led the interrogation at such an hour knew of the name and employment of defendant's counsel on Friday, P. M. The technique and timing of the interrogation placed the defendant under the pressure of social conviction not to awaken her counsel at 2:00 A. M. and it is safe to assume that the selection of the hour by the police was purposely calculated to procure an additional statement outside the presence of counsel, all in violation of the defendant's rights under the Fifth and Fourteenth Amendments of the Constitution of the United States particularly where the total hazard of her discussion with the police was not made known to her, she had previously been informed that the contemplated charge was voluntary manslaughter, not murder.

Respectfully submitted,

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Attorneys for Petitioner

SUPREME COURT OF GEORGIA

NUNNALLY V. STATE

CASE NUMBER: 30250

DATE OF STAY ORDER: DECEMBER 30, 1975

The Honorable Supreme Court met pursuant to adjournment.

By Presiding Justice Undercofler:
The following direction was given:
Alice Elizabeth Nunnally v. The State

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on December 15, 1975, such motion is hereby granted, subject to the following conditions:

The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment, and until the final disposition of the said case by that court; Provided, that promptly upon the filing of such appeal or application in the Supreme Court of the United States, the clerk of this court shall be notified thereof in writing and also shall be notified of any judgment of that court denying such application or appeal and of any motion for rehearing, or, if no application or appeal be filed in that court within the said ninety day period or within an authorized extension thereof, the clerk of this court shall be promptly so notified in writing.

/s/ Hiram K. Undercofler
Presiding Justice

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PROOF OF SERVICE

GEORGIA, COBB COUNTY

I, ROBERT E. McDUFF, Attorney for Appellant, Alice Elizabeth Nunnally, in Case Number 30250, in the Supreme Court of the State of Georgia, against State of Georgia, do hereby swear that on the 24th day of December, 1975, I served a copy of motion to stay remittitur while application is made to the Supreme Court of the United States for a Writ of Certiorari by mailing a copy to:

The Honorable Arthur K. Bolton
Attorney General
State Capitol
Atlanta, Georgia 30334

The Honorable George W. Darden
District Attorney
Cobb County Courthouse
Marietta, Georgia 30060.

/s/ Robert E. McDuff
Robert E. McDuff
Attorney for Appellant

Sworn to and subscribed before me this 24th day of December, 1975.

/s/ Donna Sturdevant
Notary Public,
Cobb County, Georgia

CERTIFICATE OF SERVICE OF PETITION FOR CERTIORARI

I, ROBERT E. McDUFF, Attorney for Appellant, ALICE ELIZABETH NUNNALLY, in Case Number 30250 in the Supreme Court of the State of Georgia, against State of Georgia, do hereby swear that on the 9th day of March, 1976, I served three copies of the petition for certiorari by mailing the same to the office of:

The Honorable Arthur K. Bolton
Attorney General
State Capitol
Atlanta, Georgia 30334

and by serving three copies of the petition for certiorari by mailing the same to the office of:

The Honorable George W. Darden
District Attorney
Cobb County Courthouse
Marietta, Georgia 30060.

ROBERT E. McDUFF
Attorney for Appellant

APPENDIX

APPENDIX "A"

SUPREME COURT OF GEORGIA

NUNNALLY V. STATE

CASE NUMBER: 30250

ORDER DATE: December 15, 1975

Clerk's Office, Supreme Court of Georgia

Atlanta 12/15/75

DEAR SIR:

The motion for a rehearing was denied today: Case Number 30250, Nunnally v. The State

Jordan, J., dissents.

Yours very truly,

Mrs. Joline B. Williams, Clerk

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APPENDIX "B"

30250. NUNNALLY v. THE STATE OF GEORGIA

235 Ga. 693 (1975)

UNDERCOFLER, Presiding Judge.

Mrs. Alice Elizabeth Nunnally was convicted of murder and concealing a death by a jury in the Superior Court of Cobb County and sentenced to life imprisonment for murder and to twelve months for concealing a death to run concurrently, and she appeals her convictions to this court.

At trial, the prosecution presented evidence to establish the following:

Late in the evening on July 11, 1974, Mrs. Elaine Calhoun filed a missing persons report on her husband, Lee Calhoun, with the Smyrna, Georgia Police Department. A description of Lee Calhoun and his automobile was transmitted to all Smyrna police units. His automobile was located in the parking lot of the Belmont Hills Shopping Center about 2:20 a.m., July 12, 1974. At 4:45 a.m. on July 12, 1974, Patrick Nunnally reported to the Smyrna Police Department by telephone that there was a person shot at 2295 Robin Lane, Smyrna, Georgia.

Officers who responded to the call were met in the driveway of the home by Patrick Nunnally, son of the appellant who told them there was a body in the basement of the house and that his mother was inside the house in an hysterical condition. The officers went to the basement but were unable to locate a body or any signs of foul play.

They then talked with the appellant and her husband. Appellant stated that the victim, Lee Calhoun, had come

by the home earlier on the morning of July 11, 1974, to pick up a pistol because he was going to his father's house and wanted to take the pistol with him. She related that she got the pistol (a Smith and Wesson, .38 caliber revolver) from the bedroom; that she and the victim were going to the basement; that as she went to hand the pistol to the victim, it struck a metal pipe in the basement discharging; and that it struck him. She stated that she passed out after the shot was fired and did not regain consciousness until later. Appellant then told the officers that the body could be located under some cardboard boxes against the north wall of the basement.

A homicide detective located the body under eight to twelve cardboard boxes stacked about 3 1/2 feet high, lying face down, wrapped in plastic and bound with nylon stockings. He also recovered a bullet from the basement floor.

Thereafter, appellant retrieved a .38 caliber Smith and Wesson revolver and a box of .38 caliber bullets from a dresser drawer in her bedroom. The revolver was not loaded and was wrapped in cosmoline treated paper in its original box. One bullet was missing from the box.

Laboratory tests indicated that the injury was inflicted at the base of the stairs about twenty feet from where the body was located, that the victim had neither handled nor discharged a firearm, and that the bullet found in the basement was fired from the pistol that the appellant surrendered to the officers.

Autopsy of the body revealed an absence of gross powder wounds or residue on the victim's shirt indicating the gun was at least three feet away from the body when it was discharged. The bullet entered the chest and traveled downward at a 30 degree angle. Death was caused

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by a gunshot wound between 8:30 a.m. and 11:00 a.m. on July 11, 1974.

Detectives interviewed the appellant at 10:00 a.m. on July 12, 1974. She related the following:

At approximately 10:00 a.m. on July 11, 1974, the victim came to her home on foot. He came in the house and went into the bedroom with her and helped her make up the bed. He inquired about a gun that she owned and said he wanted to take this gun with him to his father's house. She loaded the gun and together with the victim proceeded to walk down the stairs to the basement to go out into the back of the house to fire the gun into an embankment. As they were proceeding down the stairway into the basement, the victim turned and reached out for the gun and it accidentally hit a support beam and fired. At this point she blacked out. When she regained consciousness, the victim was dead. She then went upstairs, placed the revolver on the kitchen table, received a phone call from a relative in Rome, Georgia, concerning a sister who was ill, and blacked out again. Upon waking up, she took the shells out of the revolver and placed them in the shell box. She cleaned the revolver and put it back in its original box.

After that she went downstairs and put the victim's body on some large plastic sheets and bound him up with the plastic, some garbage bags, and some nylon stockings. She dragged the body to the place of concealment and covered it with the cardboard boxes. She then cleaned the blood from the basement floor with ammonia, washed the throw rug at the base of the stairs in the washing machine, and then cleaned herself. At some point after the shooting her sister and her sister's husband came by relative to visiting her sister in Rome but she did not want to go with them. She stated that she and the victim loved each other.

At approximately 2:00 a.m. on July 13, 1974, detectives again questioned the appellant. At this time she related that the victim had not come to her home on foot, but rather that he had called her and she had picked him up at Belmont Hills Shopping Center and he had lain down in the front seat of the car so he would not be seen by the neighbors. Again she related that they were going down the basement stairs in order to fire the gun in the back yard. She stated that the victim reached around with both hands and attempted to grab the gun from her, and she became afraid as she pulled back and fired the weapon. Appellant stated that she believed that the victim wanted the gun to fire.

An Atlanta police officer had purchased the weapon for the appellant and showed her how to use the weapon.

Sometime about midday on July 11, 1974, Lewis Reagin talked with appellant on the phone about thirty minutes about some church business. He noticed nothing unusual regarding her speech or manner.

Elaine Calhoun, widow of the deceased, testified that the conduct between appellant and her husband had become unusual in the last six months in that appellant, when present with the deceased, would often stare at him in a very uncommon manner.

The defense presented the following evidence:

The appellant testified in her own behalf that she had been acquainted with the victim and his wife for approximately ten years through membership in the church. She obtained the revolver from the police officer who had purchased it for her. She planned to make a gift of the revolver later to this same officer because he was supposed to move.

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She related that on Thursday morning, July 11, 1974, she was working by herself at her home when the victim called and asked her to pick him up at Belmont Hills Shopping Center. When they arrived at her home, the victim volunteered to help her make the beds, and he noticed some packages she had wrapped for a luau and inquired as to whether or not she had obtained the gun. She stated that she had and showed it to him. He showed her how to load it. She and the victim were walking down the stairs into the basement. As she reached approximately the second or third step from the bottom he startled her by reaching back with his left hand and taking hold of her right hand, the hand which had the gun. She was not expecting him to do this and when he did, she pulled back and the gun went off. She had scratches on the back of her hand. She slipped on the step but was not sure whether she slipped just before or just after the gun fired. She heard the noise and as she reached for him, blood gushed all over her back, her hair, her mouth, and her neck. As he fell, she caught him and, under his weight, managed to lay him down at the bottom of the kitchen steps. Blood appeared to be everywhere and she lost consciousness. She could not remember what happened once she got the victim to the floor. She thought about calling an ambulance, but she was in shock, and the next thing she could remember was that the telephone was ringing and she went upstairs to answer it. When she answered the telephone, it was her brother-in-law who told her that her sister in Rome had been injured. After that, she did not remember what happened. She remembers sitting down on the floor and she remembers seeing blood all over her. Further, she remembers thinking about the victim and that he did not like blood. All she could think about at that point was cleaning the blood off the victim. She then removed his pants and washed the

blood off his legs. After that, she put a piece of plastic under his head to keep it out of the blood. She raised him up and put plastic under him to get him out of the blood, moved him, and washed the bloody rug and bloody pants. All the blood did not wash out of the pants. After she moved the body she went back upstairs, took a shower and washed her clothes. The body was placed under some boxes in the basement after having plastic bags put around it. Appellant's other sister came by the house on her way to Rome and helped the appellant go to the bedroom and lie down. When appellant's son and husband came home that evening, she remembered that there was something she needed to tell them. She could not remember what it was, she had a feeling that she was crushed, and that there was something she was supposed to do. She knew that she needed to start supper. She could not open the basement door and could not go down to the basement but she did not know why. She and her husband went out to dinner and her son went to a ball game. Her husband went to a civic club meeting. She was in the house alone for approximately two hours that evening. Something caused her to awaken after she and her husband had gone to bed that evening. It appeared to her like it was a loud noise and the vision of the victim standing between the posts like he appeared that morning came to her mind. She immediately told her husband that there was a body in the basement and he did not believe it. She became hysterical. There was some discussion about what to do. She told the police that when the shot was fired, she heard a ringing and she could still hear the ringing. She did not know where the ringing noise came from but she thought the gun must have hit the post and that caused it.

Appellant had a series of appointments with Dr. Sheldon Cohen, an Atlanta psychiatrist. His evaluation of her

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was as follows: "My impression was that this woman, after the shooting experienced considerable psychological shock and she behaved in some ways in sort of an automatic way. That is what you might think of as a splitting of her mind and of her consciousness. She knew that something should be done, but apparently he died rather quickly; and yet at the same time she was concerned about the mess that was made and felt this had to be straightened out . . . So she unconsciously, I think, put part of this out of her mind and went about behavior in a semblance of normality. Now this would be consistent with my impression of her and the impression that the computer gave me of her habits and the impression that Dr. Knopf got from his two and a half hours with her, and that is that she has great need to be accepted, to appear to be a very good person, to be normal and so forth.

Appellant's husband testified that he had returned home from work on Thursday, July 11, 1974, at approximately 5:00 p.m. He related that he noticed nothing unusual or particular about the conduct of his wife that evening until later on in the evening when she seemed distressed and began to inquire of him as to whether or not he would stand by her no matter what. At this time appellant told her husband there was a body in the basement. After Mrs. Calhoun called in search of her missing husband, appellant's husband went back and asked her and she said, "It's Lee's body that is in the house."

A number of character witnesses testified to appellant's good reputation in the community prior to July 11, 1974. *Held*:

1. Appellant's first four enumerations of error are based on the general grounds. Considering the evidence admitted in court as summarized above, enumerations of error on the general grounds are without merit.

2. In enumerations of error numbers 7, 8, and 18 appellant objects to the trial court permitting the widow of the deceased to sit at the prosecution's counsel table during the course of the trial.

The conduct of the trial of any case is necessarily controlled by the trial judge, who is vested with a wide discretion and in the exercise of which an appellate court should never interfere unless it is made to appear that wrong or oppression has resulted from its abuse. *Atlanta Newspapers v. Grimes,* 216 Ga. 74 (114 SE2d 421) (1960); *Walker v. State,* 132 Ga. App. 476 (208 SE2d 350) (1974).

It is only in cases where there has been no showing by the state that a witness' presence at the counsel table was necessary for an orderly presentation of the case that the appellate courts of this state have found an abuse of discretion in this situation. *Walker v. State,* supra.

In this case the prosecutor stated in his place that the presence of the widow in the courtroom would be necessary to assist the state in the orderly presentation of the case. The record is devoid of any emotional display by Mrs. Calhoun which would have in any manner prejudiced the appellant's right to a fair trial. No improper conduct on her part was ever brought to the attention of the court.

Enumerations of error numbers 7, 8, and 18 are without merit.

3. In enumerations of error numbers 9, 10, 32, and 35 appellant alleges the court erred in failing to charge the law relating to the defense of insanity.

We note that appellant's counsel at trial made no request for a charge relating to the defense of insanity and made no objection to the trial court's omission of such charge.

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Pertinent to these enumerations was the testimony of the appellant and her psychiatrist.

Appellant testified that in the afternoon and evening of July 11, 1974, she could not remember what it was that was pressing on her mind. Her psychiatrist testified that his impression of her "was that this woman, after the shooting experienced considerable psychological shock and that she behaved in some ways in sort of an automatic way. That is what you might think of as a splitting of her mind, of her consciousness. Certainly she knew that this man had been shot, that she had shot him. She knew that something should be done, but apparently he died rather quickly; and yet, at the same time she was concerned about the mess that was made and felt this had to be straightened out. And she was also concerned about—'Gee, I don't want to upset my husband and son.' So she unconsciously, I think, put part of this out of her mind and went about behavior in a semblance of normality."

When asked whether or not the shock of seeing Mr. Calhoun shot would be sufficient to cause her, from around one o'clock in the afternoon until about 11:30 that night, not to be able to recall the incidents of that morning the psychiatrist responded: "I would say this is possible, but I certainly don't know whether this was so or not." He stated it was a medical possibility.

None of the testimony concerning appellant's loss of memory relates to the murder charge even remotely or to any time prior to the death of the victim.

Although appellant testified she blacked out twice after the shooting, her testimony indicates she did not forget the body in the basement until after she had taken some of the victim's clothes to wash, cleaned the gun and put it away, wrapped the body, dragged it to the side of the basement,

covered it with boxes, cleaned the blood from the basement floor with ammonia, washed the throw rug that had blood on it, washed her bloody clothing, and had taken a shower. It was only after Mrs. Calhoun called inquiring about her husband that she recalled that the body was in the basement.

The hiatus in memory was after all acts of concealment were complete and although possibly applicable to a failure to report the death from the time of its concealment until her memory returned at the time of Mrs. Calhoun's call, it in no way relates to the acts of concealment or indicates any delusional compulsion as to the concealment which overmastered her will to resist committing the crime.

The evidence did not demand that the trial judge charge the jury on Code Ann. § 27-1503 (Ga. L. 1952, p. 205; 1972, p. 848), or the general principles of law relating to the question of insanity. See *Massey v. State*, 222 Ga. 143, 147 (149 SE2d 118) (1966); *Floyd v. State*, 143 Ga. 286 (84 SE 971) (1915); *Garrett v. State*, 126 Ga. App. 83, 84 (189 SE2d 860) (1972).

4. In enumerations of error numbers 11 and 12 appellant alleges the court erred in charging the following: "If you find a homicide is proved to have been committed in this case by this defendant with an instrument which if you find was, in the manner in which it was used upon the occasion in question, a weapon likely to produce death, the law from the use of such weapon in that manner presumes malice and the intent to kill. It is not incumbent upon the accused to prove an absence of malice if the evidence for the prosecution shows facts which may excuse or justify the homicide. If the homicide was in your opinion unlawful, and if there was present the intent to kill and malice, the offense would be murder, and it would

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be your duty to find the defendant guilty of the crime of murder."

These passages were followed by instructions by the court that: "It is not incumbent upon the accused to prove an absence of malice if the evidence for the prosecution shows facts which may excuse or justify the homicide. Ladies and gentlemen, I charge you that in this case the accused is not required to produce evidence of mitigation, justification, or excuse on her part to the crime of murder where the mitigation, justification, or excuse is shown by the evidence on the part of the State. It is not required of the accused to prove an absence of malice if the evidence for the State shows facts which may excuse or justify the homicide."

These instructions correctly state the law and did not place the burden on the appellant to prove or present evidence to justify or mitigate the homicide. These enumerations of error are without merit.

5. Appellant in her 13th enumeration of error alleges that the trial court erred in the following charge: "I charge you that if you believe, and believe beyond a reasonable doubt, that the defendant, Alice Elizabeth Nunnally, did in this County in the State of Georgia commit the offense of murder by unlawfully and with malice aforethought kill and murder one Lee Calhoun, a human being, by shooting him with a .38 caliber pistol, thereby inflicting upon the said Lee Calhoun mortal wounds from which he died, contrary to the laws of said State, and good order, peace and dignity thereof, then you would be authorized to convict the defendant of the offense of murder as charged in this bill of indictment."

The thrust of appellant's position here is that the use of the preposition "by" was error in that it would cause

the jury to believe that the only thing that they must find in order to return a verdict of guilty as to Count 1 of the indictment was that the victim was shot with a .38 caliber pistol from which wounds he subsequently died.

Recently, in the case of *State v. McNeill,* 234 Ga. 696 (217 SE2d 281) (1975) this court quoted with approval the following language: "In *Brown v. Matthews,* 79 Ga. 1 (4 SE 13), this court said: 'A charge, torn to pieces and scattered in disjointed fragments, may seem objectionable, although when put together and considered as a whole, it may be perfectly sound. The full charge being in the record, what it lacks when divided is supplied when the parts are all united. United they stand, divided they fall.' This is still sound law."

The charge considered in its entirety can not be construed to lead the jury to believe that they could return a verdict of guilty of murder if they should find only that the victim was mortally wounded by a shot fired from a .38 caliber pistol.

Enumeration of error number 13 is not meritorious.

6. In her 16th and 17th enumerations of error appellant alleges that the trial court erred in charging the jury as follows: "That the acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. That a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted."

The quoted portions of the charge are correct and relevant statements of well established legal principles codified in the laws of this state. Code Ann. § 26-603 (Ga. L. 1968, pp. 1249, 1269) and § 26-604 (Ga. L. 1968, pp. 1249,

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1269). The trial court correctly charged the jury with these principles of law.

7. In enumerations of error numbers 26, 27 and 30, appellant alleges the trial court erred in failing to charge defense requests to charge dealing with the presumption of innocence and reasonable doubt.

The trial court charged as follows: "Every person is presumed innocent until proved guilty. No person shall be convicted of a crime unless each element of such crime is proved beyond a reasonable doubt. The burden of proof rests upon the state to prove each element of the offense charged beyond a reasonable doubt. The state, however, is not required to prove the guilt of the defendant beyond all doubt. Moral and reasonable certainty is all that can be expected in a legal investigation.

"A reasonable doubt means just what it says. It is a doubt of a fair-minded, impartial juror honestly seeking the truth, not an arbitrary or capricious doubt; but it is a doubt arising from a consideration of the evidence, from a lack of evidence, or from a conflict in the evidence. If after giving consideration to all of the facts and circumstances of the case, your minds are wavering, unsettled and unsatisfied, then that is the doubt of the law and you should acquit. But if that doubt does not exist in your minds as to the guilt of the defendant, then you should convict."

The court adequately presented the law as it relates to the presumption of innocence and the court's failure to charge the appellant's requests was not error.

8. In enumerations of error numbers 28 and 29 the appellant alleges the trial court erred in the instructions given on good character and in refusing to give a requested instruction.

The requested charge was: "I charge you, gentlemen of the jury, that evidence of good character is a substantive fact, and like any other fact tending to prove innocence, it may raise a reasonable doubt of guilt sufficient to authorize acquittal."

The complete charge given by the trial court relating to the issue of good character was as follows: "Now, ladies and gentlemen, the court charges you, in criminal cases the defendant is permitted to offer evidence as to general good character. Evidence of good character may be of itself sufficient to create a reasonable doubt as to the guilt of the accused, where otherwise no reasonable doubt would exist, or when considered in connection with the other evidence in the case, it may be sufficient to create such a doubt. Nevertheless, if the jury should believe beyond a reasonable doubt that the defendant is guilty as charged in the indictment, they would be authorized to convict, notwithstanding evidence of general good character. Good character affords no valid excuse or justification for committing a crime. Good character, like any other fact tending to establish innocence, is a substantive fact and should be so regarded by the jury along with other evidence in the case in determining whether the defendant is guilty beyond a reasonable doubt."

Considering the entire charge as it relates to the issue of good character the trial court did not err in giving the charge and denying the requested charge. The charge clearly instructed the court that good character in and of itself may be sufficient to create a reasonable doubt as to the guilt of the accused.

Enumerations of error numbers 28 and 29 are without merit.

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9. In enumeration of error number 34 appellant avers the court erred in its charge as it relates to concealing death by failing to advise, charge and make clear to the jury, that the crime of concealing death must not only include the act or acts set forth in Code Ann. § 26-1104 (Ga. L. 1968, pp. 1249, 1277), but that in addition thereto there must be present an intent to commit the crime of concealing death.

The trial court charged the offense of concealing death as follows: "Now ladies and gentlemen, the charge in count two of this indictment being that of concealing death, I will give you the definition of that offense as codified in the Criminal Code of the State of Georgia and defined in Ga. Code Ann. § 26-1104. I charge you the following: A person commits concealing death when he, by concealing the death of any other person, hinders a discovery of whether or not such person was unlawfully killed."

Thereafter the court charged: "Ladies and gentlemen, I charge you certain definitions which are codified as definitions in the Criminal Code of the State of Georgia. In this connection I charge you, ladies and gentlemen, that a crime is a violation of a statute of this state in which there shall be a union of joint operation of act, or omission to act, and intention. That a person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking, or intention."

The instruction clearly charges that the act to be criminal must be intentional rather than non-volitional.

This enumeration of error has no merit.

10. In enumerations of error numbers 14 and 15 appellant alleges the court erred in giving the following charges to the jury: "An admission, as applied to a crim-

inal case, is a statement of fact or circumstance by the defendant, not amounting to a confession of guilt, but tending to prove the offense and from which the guilt may be inferred," and "An incriminating statement is one made by the defendant which tends to establish his guilt, or tends to disprove some defense set up by him or one from which together with other facts, if any are proven, guilt may be inferred."

Challenge to both of these instructions was considered in *Fowler v. State*, 187 Ga. 406 (1 SE2d 18) (1939) and rejected. These enumerations are without merit.

11. After considering appellant's allegations of error concerning specific portions of the trial court's charge, the refusal to give specific requested instructions, and after reviewing the evidence and the trial court's charge, we conclude that enumerations of error numbers 5 and 6 are without merit. The enumerations contend that the charge of the court was not adjusted to the evidence, was confusing, misleading, and erroneous and was violative of the Fifth and Fourteenth Amendments of the Constitution of the United States because it violated due process of law by placing the burden of disproving guilt on the appellant.

12. In enumerations of error numbers 19, 20 and 21, appellant objects to the admission of testimony concerning her statements in her home at approximately 5:00 a.m. on July 12, 1974, and while in custody at 10:30 a.m. on July 12, 1974, and at 2:00 a.m. on July 13, 1974.

At the time of appellant's statements at 5:00 a.m. on July 12, 1974, the police officers were unable to ascertain that a crime had occurred because they had not been able to locate the body, and neither the appellant nor her husband was then under suspicion of anything. The appellant was not in custody but on the contrary was in the comfort

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of her own home with her husband and grown son present. This is a completely different setting from that considered by the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436 (86 SC 1602, 16 LE2d 694, 10 ALR3d 974) (1966) where the accused was an "in custody" suspect of his police interrogators.

Testimony concerning the other statements of appellant were admitted only after a hearing was held by the trial court out of the presence of the jury in accordance with Jackson v. Denno, 378 U.S. 368 (84 SC 1774, 12 LE2d 908) (1963). The trial court made a preliminary determination that warnings in conformity with the requirements set down in Miranda v. Arizona, supra, were adhered to and made a determination that the statements were voluntary and admissible for the jury's consideration. Thereafter they were submitted to the jury under appropriate instructions concerning admissions and incriminating statements. His determination is supported by a preponderance of the evidence as required by *High v. State*, 233 Ga. 153 (210 SE2d 673) (1974).

Enumerations of error numbers 19, 20 and 21 are not meritorious.

13. In enumeration of error number 25 appellant alleges the court erred in allowing the testimony of a firearms specialist as a rebuttal witness.

Calling an unlisted witness in rebuttal is not error. *Prevatte v. State*, 233 Ga. 929, 930 (214 SE2d 365) (1975); *Eberheart v. State*, 232 Ga. 247, 253 (206 SE2d 12) (1974).

14. Enumerations of error numbers 22, 23, 24, 31, and 32 concern the trial court's refusal to direct a verdict of not guilty. There was evidence admitted in court from which the jury could find every element of both offenses and they were properly instructed including instruction

on circumstantial evidence. The evidence, or lack of it, did not demand a verdict for the defendant on either charge. These enumerations of error are without merit.

15. In enumeration of error number 36 appellant pleads in the alternative that the court erred in not charging the jury on involuntary manslaughter.

As we read the testimony, the homicide was either murder or accident. The trial court did not err in omitting a charge on involuntary manslaughter and none was requested at trial. *Bonds v. State*, 232 Ga. 694 (208 SE2d 561) (1974); *Scott v. State*, 210 Ga. 137 (2) (78 SE2d 35) (1953); *Sirmans v. State*, 229 Ga. 743 (2, 3) (194 SE2d 476) (1972); *Meadows v. State*, 230 Ga. 471 (3) (197 SE2d 698) (1973).

Judgment affirmed. All the Justices concur, except Ingram, J., who concurs in the judgment only, and Jordan J., who dissents.

ARGUED SEPTEMBER 9, 1975—DECIDED NOVEMBER 24, 1975—REHEARING DENIED DECEMBER 15, 1975.

Murder, etc. Cobb Superior Court. Before Judge Ravan.

Holcomb & McDuff, Robert E. McDuff, Terry E. Willis, for appellant.

George Darden, District Attorney, B. Wayne Phillips, Assistant District Attorney, for appellee.

APPENDIX "C"

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

MOTION DOCKET 13757

INDICTMENT NO. 6385

MURDER

STATE OF GEORGIA

VS

ALICE ELIZABETH NUNNALLY

ORDER

MOTION FOR NEW TRIAL

The above stated matter having regularly come before me and after hearing argument from the counsel for the defendant and from the State and after a thorough review of the record and transcript of the above-styled case, the court finds as follows:

1.

The verdict was fully supported by the evidence.

2.

The verdict is not against the weight of the evidence.

3.

The verdict is not contrary to law and the principles of justice.

4.

The charge of the court was adjusted to the evidence and was neither confusing, misleading or erroneous.

5.

The charge of the court was not violative of the Fifth and Fourteenth Amendments of the United States in that it violated due process of law by placing a burden of disproving guilt on the defendant.

6.

The court recalls no circumstance or observation whatsoever in which the widow of the deceased displayed any unusual show of emotion or made any statement or outburst which could have possibly influenced the jury. The court exercised its discretion in allowing the widow of the deceased to remain at the prosecution table, based upon the statement by counsel for the state that Mrs. Calhoun's presence would assist the court in the orderly presentation of its case. No improper conduct of Mrs. Calhoun was ever brought to the attention of the court. Had the court been informed of any display of emotion by Mrs. Calhoun or observed any such conduct, the court would have excluded her from the courtroom.

7.

No evidence was elicited by the defendant or by the state which suggested the defense of insanity at the time of the commission of the crime. Further no requests were made by the defendant for a charge on the principle of in-

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sanity. The defendant contended that the shooting was accidental and the defense of insanity was never raised by the defendant during the trial of the case either by the evidence or by argument of counsel.

For the reasons herein stated the Motion for New Trial by the defendant, Alice Nunnally, is denied.

SO ORDERED this the 2nd day of June, 1975.

/s/ Howell C. Ravan
Judge, Cobb Superior Court,
Cobb Judicial Circuit

Presented by:

/s/ George W. Darden
George W. Darden
District Attorney
Cobb Judicial Circuit

APPENDIX "D"

IN THE
SUPERIOR COURT FOR THE COUNTY OF COBB
STATE OF GEORGIA

MOTION DOCKET 13757

INDICTMENT NO. 6385

MURDER

THE STATE

VS

ALICE ELIZABETH NUNNALLY

MOTION FOR NEW TRIAL

GROUND 4

The court erred in charging the jury as follows:

> "If you find a homicide is proved to have been committed in this case by this defendant with an instrument which if you find was, in the manner in which it was used upon the occasion in question, a weapon likely to produce death, the law from the use of such weapon in that manner presumes malice and the intent to kill." (T-490)

Movant avers that such charge was erroneous and injurious to her because:

(a) It was confusing to the jury.

(b) It was misleading to the jury.

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(c) That it effectively shifted the burden of proof from the State to the defendant where the defense was affirmatively set forth. This charge is tantamount to a charge that malice will be presumed from the commission of a homicide with a deadly weapon and that the burden rests upon the accused to show justification or mitigation. The only evidence offered by the State to prove that the appellant committed the homicide by the use of the deadly weapon was accompanied by an explanation stating that the death was an accident.

(d) That the charge as given did not state or establish any way by which the defense could overcome presumption of malice and intent to kill, but left the jury with the impression that just a mere fact of the use of the deadly weapon removed from the jury determination the issue of malice and intent to kill. Under the charge given, if the jury found that a weapon was used likely to produce death, then the presumption of law was existent, and this alone would authorize a verdict of guilty. The charge was tantamount to saying that the jury must find that the instrument was not a deadly weapon in order to find accident which in this case finding that a loaded pistol is not a dangerous weapon was a legal impossibility and was tantamount to a direction of a verdict of guilty.

(e) Said charge was not adjusted to the facts of the case.

(f) Said charge was violative of the Fifth and Fourteenth Amendments of the Constitution of the United States in that it violated due process of law by placing the burden of disproving guilt not presumption of innocence on the defendant.

GROUND 5

The court erred in charging the jury as follows:

"If the homicide was in your opinion unlawful, and if there was present the intent to kill and malice, the offense would be murder, and it would be your duty to find the defendant guilty of the crime of murder." (T-490)

Movant avers that such charge was erroneous and injurious to her because:

(a) That there was only one sentence between it and the preceding charge complained of stating that the law presumed malice and intent to kill and with malice having been previously defined as an unlawful intention to kill without justification it established in the mind of the jury a duty to find the defendant guilty of the crime of murder. It further placed an intolerable burden upon the defendant to disprove the contention that she was guilty of murder.

GROUND 6

The court erred in charging the jury as follows:

"If you find a homicide is proved to have been committed in this case by this defendant with an instrument which if you find was, in the manner in which it was used upon the occasion in question, a weapon likely to produce death, the law from the use of such weapon in that manner presumes malice and the intent to kill.

It is not incumbent upon the accused to prove an absence of malice if the evidence for the prosecution shows facts which may excuse or justify the homicide. If the homicide was in your opinion unlawful, and if there was present the intent to kill and malice, the

offense would be murder and it would be *your duty* to find the defendant guilty of the crime of murder." (T-490)

Movant avers that such charge was erroneous and injurious to her because:

(a) It was confusing to the jury.

(b) That it was misleading to the jury.

(c) That it shifted the burden of proof to the defendant.

(d) That it was in effect a charge of guilty and a directed verdict.

(e) It was not adjusted to the facts of the case.

(f) Said charge was violative of the Fifth and Fourteenth Amendments of the Constitution of the United States in that it violated due process of law by placing the burden of disproving guilt not presumption of innocence on the defendant.

The reasons for the above set forth objections are as follows:

Though the court in between the two charges previously complained of added a sentence: "It is not incumbent upon the accused to prove an absence of malice if the evidence for the prosecution shows facts which may excuse or justify the homicide." (T-490). The court did not go further to explain what it meant, if it was not incumbent upon the accused to prove the absence of malice. What must the defendant do to get rid of the presumption? Nor did the court explain what legal effect the failure of not proving the absence of malice would have in the case. Such statement and sentence was in fact meaningless to the jury and if anything instead of relieving the defendant

of having to negate malice, really was telling the jury that the defendant was in a hopeless situation of being guilty. This is particularly true where the charge immediately preceding such statement stated that a death had occurred on the occasion in question: "a weapon likely to produce death, the law from the use of such weapon in that manner presumes malice (and malice having been defined as an unlawful killing previously in the charge) and the intent to kill" and then immediately followed it with "If the homicide was in your opinion unlawful, and if there was present the intent to kill and malice (which the court had already said was to be presumed where a deadly weapon was to be used) the offense would be murder, and it would be your duty to find the defendant guilty of the crime of murder." (T-490). There was no charge that the court could give thereafter which could erase the prejudged legal presumption of guilt of the defendant from the minds of the jury after the jury has heard such a strong charge against the defendant, without first correcting that particular charge. For superimposed upon every charge thereafter, which would relieve the defendant of the crime, would be the presumption of malice and the presumption of the intent to kill. The charge did not limit the presumption by saying that it was rebuttable and as a matter of fact as stated in the charge; that the law presumes it, gives the impression that it was not rebuttable.

GROUND 7

The court erred in charging the jury as follows:

"I charge you that if you believe, and believe beyond a reasonable doubt, that the defendant, Alice Elizabeth Nunnally, did in this county and State of Georgia commit the offense of murder by unlawfully and with malice aforethought kill and murder one Lee

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Calhoun, a human being, *by* shooting him with a .38 caliber pistol, thereby inflicting upon the said Lee Calhoun mortal wounds from which he died, contrary to the laws of said State, and good order, peace and dignity thereof, then you would be authorized to convict the defendant of the offense of murder as charged in this bill of indictment." (T-493)

Movant avers that such charge was erroneous and injurious to her because:

(a) It was confusing to the jury.

(b) That it was misleading to the jury.

(c) That it was an erroneous charge.

(d) Said charge was violative of the Fifth and Fourteenth Amendments of the Constitution of the United States in that it violated due process of law by placing burden of disproving guilt not presumption of innocence on the defendant.

The reasons for it being misleading, confusing and erroneous are as follows:

Already earlier in the charge, the question of malice was presumed by the court as a matter of law. See Grounds 4, 5 and 6 above. In closing the charge to the jury and in structuring the charge, the judge separated the elements of unlawful and malice with the activity of shooting with the phrase "kill and murder one Lee Calhoun, a human being" and then used the preposition "by" indicating that the determination of murder of Lee Calhoun was to be based upon only the elements that followed the preposition *"by"*. The only elements that followed the preposition *"by"* is "shooting him with a .38 caliber pistol thereby inflicting upon said Lee Calhoun mortal wounds from which he died contrary to the laws

of the State in good order, peace and dignity thereof." It omitted the question of malice and aforethought from the consideration of the jury. Such charge should have read:

> "Alice Elizabeth Nunnally did in this county and state of Georgia commit the offense of murder by killing one Lee Calhoun, a human being, by unlawfully and with malice aforethought shooting him with a .38 caliber pistol thereby inflicting upon said Lee Calhoun mortal wounds from which he died."

The charge as above phrased would then show all of the elements of murder after the prepositional phrase, not leaving it to the jury for interpretation or supposition of what the elements of murder consisted, and generating both a confusing, misleading and erroneous charge.

APPENDIX "E"

IN THE
SUPERIOR COURT FOR THE COUNTY OF COBB
STATE OF GEORGIA

MOTION DOCKET 13757

INDICTMENT NO. 6385

MURDER

THE STATE

VS

ALICE ELIZABETH NUNNALLY

MOTION FOR NEW TRIAL

GROUND 14

The court erred in allowing the testimony of Lt. Sims in the transcript concerning what he purportedly heard, stated by Mrs. Alice Elizabeth Nunnally, as is shown in the transcript as appears on pages 46 and 47 thereof.

Movant avers that the failure of the court to sustain this objection and in fact overruling it (T-45), denied the defendant of a substantial right, that of being warned that she did not have to respond to any questions, nor was she told that such information as given to the police by her could be used against her, nor was she advised that she had right of counsel. Such failure to give warnings at this point, referred to as the Miranda warnings, denied her of due process of law and the admission of the testimony into the transcript of what she purportedly told Lt. Sims was in error.

GROUND 15

The court erred in allowing the testimony of both Officer Brendle and Officer Ramsey into evidence concerning the statements allegedly made by Alice Elizabeth Nunnally to them on July 12, 1974, at 10:30 A. M. and on July 13, 1974, at 2:00 A. M., in that as to the 10:30 A. M. conversation, the defendant was led to believe that she was under the suspicion of a lesser crime than that actually charged in order to induce her to talk to the police officers was violative of her constitutional rights. (T-157). Further, the discussions at 2:00 A. M. were violative of her constitutional rights, more particularly the Fifth Amendment of the Constitution of the United States, in that the police officers had knowledge that Alice Elizabeth Nunnally, at that time had employed counsel, and this was actual knowledge that they specifically had and they attempted to take a statement at 2:00 A. M. in the morning under these circumstances was violative of the rights of the party to have counsel present putting implied social pressure upon her not to ask for her counsel in order to prevent bothering him at such hours in the evening and was purposely calculated to procure an additional statement from Alice Nunnally outside the presence of her counsel, all in violation of the Fifth and Fourteenth Amendment rights of the defendant as provided in the United States Constitution and denied her due process. (T-171).